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JESUS QUEVAS ET AL., PLAINTIFFS IN ERROR, v. J. DOWNEY HARVEY, ADMINISTRATOR. — No. 210.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

THE "MISSION INDIAN CASES."

SUPPLEMENTAL AND REPLY BRIEF FOR PLAINTIFFS IN ERROR.

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The main brief for plaintiffs in error covers fully the law of these cases, and, we contend, establishes our legal right on the strictest view of the principles and authorities applicable. Therefore we do not mean now to argue the technical issue anew, but shall in this brief reply to the argument for defendants in error, call attention to the propriety and importance of final decision by this court in the present proceeding on the merits of the entire controversy, and shall then briefly

emphasize the significant propositions of law involved, pointing out finally the equity and justice of the Indian claims.

I.

REPLY TO BRIEFS FOR DEFENDANTS IN ERROR.

The holding of Byrne v. Alas as to what the rights of Mission Indians were under the Mexican law has not been disturbed by the decision here under review; but if it had been, the Mexican law as to Indian rights cited by defendants in error in their brief is not in conflict with the doctrine established by Byrne v. Alas.

In order that the foundation upon which we claim the title to these Indians rests may be destroyed, a large part of the brief of defendants in error is devoted to showing that Indians such as the plaintiffs in error here had no rights of use or occupancy of lands under the Mexican system. Our position is that it is idle to search the authorities on this subject, for the reason that the status of the property rights of such Indians as these under the Mexican law in the territory embraced by California is conclusively fixed and determined by *Byrne* v. *Alas* (74 Cal., 628); and whether such status be there determined correctly or incorrectly, it is the established law, and has not been affected or modified by the opinion of the court in the case of *Harvey* v. *Barker* here under review, and so long as it stands as the State supreme court's construction of the Mexican law formerly applicable within the boundaries of California, it is binding upon this court. (See *Christy* v. *Pridgeon*, 4 Wall., 196.) But in

their supplementary brief counsel for defendants in error seek to make it appear that the supreme court of California, in its opinion here under review, has repudiated the doctrine established in *Byrne* v. *Alas* as to what were the landed rights of such Indians as these under the Mexican law. Nothing can be plainer, however, than the fact that the supreme court of California in this case did not attempt to pass upon the question as to what the rights of such Indians were *under the Mexican law* as to the lands they were occupying, and for the very obvious reason that it held that as *there were no Indians in possession*—the prefect having reported the land to be *vacant*—therefore there were no Indians' rights, regardless of what the Mexican law was in cases where Indians *were in possession* when grants were made. That the court did not attempt to define or pass upon the question as to what were the possessory rights of such Indians under the Mexican law is clear from the following language treating of the subsequent forfeiture of such rights by their failure to present them, namely:

> In this case, therefore, if any rights whatever can be conceded to the appellants under the former Mexican Government [a point not passed upon], such rights were in the nature of private property, or a right dependent upon the will and pleasure of the State or nation. If, as claimed, it were a right to possess, occupy, and use land, that amounted to a title to property. It being a title or right to property, whether in fee simple or possessory merely, derived from the Mexican Government, under the act of Congress of 1851, as repeatedly held, a claim to that

> right was required to be presented for confirmation. If, on the other hand, it were a mere license at the pleasure of the former Government to occupy the land, such right would not prevent that Government from granting the land unencumbered with such right.

It was perfectly clear to the mind of the Justice who delivered that opinion, that under his theory of the law, it was entirely immaterial what was the character of the Indians' rights under the Mexican law, as he held that if they were valid vested rights, entitling them to possession as against the Government and all others, they were therefore such rights as it was necessary to present to the board of land commissioners for confirmation, and that the failure to present them, however valid they might have been, was fatal to them. Or if they amounted to a mere license, then the act of the Mexican Government in making grant of the lands to another terminated the Indians' rights. In either event it was unnecessary to go into the question as to the original character or validity of the rights, for they had subsequently been cut off.

The court makes two references, one as to the grant to Warner not interfering with the Indians' rights, and the other as to Warner's grant not being subject to the Indians' rights, which when taken alone might be construed as intended to pass upon the character of their rights under the Mexican law. But these passages, when read in connection with the whole decision, show clearly that in the first instance the court merely meant that as it held there were no Indians in possession, and

the lands were "vacant" when granted, the grant *for that reason* did not interfere with any Indians' rights, as—according to the court's view—there were no Indians having any rights, there being no Indians in possession; hence the court, under this view, was not called on to determine what might have been the rights of Indians, had any been in possession. And all that was meant by the statement that "the grant to Warner of the Valle de San Jose was not *subject* to any rights or interests in the defendants" was that the grant did not *on its face* contain any reservation in defendants' favor, or purport to be subject to their rights; only this, and nothing more.

We therefore confidently assert that the construction of the Mexican law applicable to the landed right of Mission Indians in California, as fixed in the case of *Byrne* v. *Alas*, has been in no way affected by the decision here under review; and we submit further that the conclusions there reached are sound. We are not called upon, however, to go into this. But, taking counsel's own view of the matter, that *Byrne* v. *Alas* can not be regarded as still fixing the status of the Indians' landed rights under the Mexican law, we ask, Have the authorities they have quoted bettered the situation for them? We submit that when, from the mass of irrelevant matter quoted and referred to in the brief for the defendants in error, there are culled the material things, which have a bearing upon the interests here involved, the same conclusion reached by the court in *Byrne* v. *Alas* necessarily follows.

We call the court's attention to three extracts from the brief for defendants in error that in our opinion fully sustain our position.

At the bottom of page 10 it is shown that article 17 of the rules and regulations of the Mexican Congress, passed for the carrying into effect of the colonization laws of 1824, provides as follows: "In those territories where there are Missions, the lands occupied by them can not be colonized at present, nor until it be determined whether they are to be considered as the property of the establishments of the neophytes, catechumens, and Mexican colonists."

On page 11 of the brief of defendants in error it is shown that later, in 1834, when the secularization of the Missions was provided for by Governor Figueroa's provisional rules, it was provided that lots at the missions were to be divided to the Indians to cultivate, and it is said, "By subdivision 9 it was directed that *where the Indians were left in rancherias at a distance*—from the missions—[as was the case here] they should be formed into a pueblo and *a like distribution made.*"

On page 13 of the brief of defendants in error it is stated that article 20 of Governor Pico's regulations of 1845 declares: "*It being understood that they* [*the Indians*] *can not alienate said lands, but they shall be hereditary among their relatives according to the order established by the laws.*"

Here our adversaries quote the law that establishes for these Indians just such rights as we are contending for them, namely, an ownership of the beneficial title,

with no power of alienation, the use being confined to the Indians and their descendants. It is true that the law quoted contemplated the formal establishment of pueblos including these Indian villages or rancherias, and a segregation of the holdings of the individual Indians from each other; that is, that their separate tracts should be allotted to them in severalty, and this is not shown to have been done in this or any other instance that has been brought to our attention. But this partition or segvegation as between the Indians was but an insignificant incident to their title, and the failure to administer this feature of the law by the Mexican officials charged with making the allotments does not affect the *rights* of the Indians, or the policy of the law that dictated that the rancherias should be secured to them by an inalienable title.

When all of the chaff in which it is hidden is blown away we have these three propositions conceded in the brief of our adversaries: *First, that the regulations of the Mexican Congress reserved from colonization the lands occupied by the missions until it was determined whose property they were; second, that upon the secularization of the missions later, it was determined that where Indians of the missions were left on the rancherias the lands were to be distributed to them for their use and cultivation; and, third, that they should have the right to use and occupy these and that this right would pass by heredity, but that no power to dispose of them otherwise existed.*

It would be difficult by any process of reasoning, or by any other citation of authority, to justify more

clearly the conclusion reached by the court in *Byrne* v. *Alas*, as to the rights of Mission Indians under the Mexican law than is shown by these three extracts from the briefs of our adversaries. So we submit, that so far as they are concerned, it is utterly immaterial whether we consider the rights of these Indians under the Mexican law as being fixed and determined by *Byrne* v. *Alas*, or whether it depends upon the Mexican law, as clearly shown by the above citations from the brief of the defendants in error. In either case it shows a valid possessory right in the Indians.

The defendants in error seek to escape the conclusion to which these authorities necessarily lead by saying, on page 11 of their brief: "It will be observed that there is no provision made, either for the distribution of lands similar in character to the lands in suit, or for the reservation of any rights of occupancy on the part of the Indians who might be living thereon, unless organized into pueblos." This is begging the question, for the reason that the lands in controversy here are admittedly the same character of lands referred to as "rancherias," as these Indian villages are all known in the Spanish language as *rancherias;* and the fact that the Indians had not been formally organized into pueblos in no way affects the principle or policy of the law which secured to these Indians their rights of use and occupancy of these lands, prior to, and regardless of, the organization of the pueblo, and prior to and regardless of the partition and allotment of the lands. These were but administrative acts—part of the machinery outlined

in making effective the general policy which awarded to these Indians the right to use and occupy the lands, but not to dispose of them. The mere fact that these lands had not been segregated between the Indian claimants, as was contemplated under the Mexican law, can not be taken advantage of by the defendants in error here, as the mere failure to administer this phase of the law would not inure to the benefit of the Mexican grantee. He can not complain that the Indians hold their lands in common rather than in severalty; he is not injured by such a course.

CERTAIN ERRORS AS TO FACTS IN THE BRIEF OF DEFENDANTS IN ERROR.

Counsel's statement at the bottom of page 15 and top of page 16 of their brief, that the *Agua Caliente* was not recognized as a Mission Rancho, is contrary to the fact, and in the face of the evidence of all parties in this case; and the support given to such view by the citation from Bancroft is, under the circumstances, entitled to no weight.

We do not know just what Mr. Bancroft's statement means. The citation can not be verified. A "mission rancho" may have meant a holding in the cultivation of the mission itself by the members of the religious order and its immediate servants, and possessing buildings and other improvements which they erected. In such sense Agua Caliente was not a mission rancho; but it is beyond question that it was under the jurisdiction of the San Luis Rey Mission and had intimate relations therewith. This record shows that the fathers

visited Agua Caliente and held religious services in a building which typified the joint purpose of the mission work—the building was a granary and a church; it bore the cross (Rec., 209, p. 41). The crops were planted under the supervision of the mission and the harvests carried to the mission (id., pp. 44, 48). Nuns of the church, presumably attached to the mission or responsible to it, resided at Agua Caliente until 1846 (id., p. 42). There can be no more doubt of the mission relation than of the immemorial occupancy and cultivation of these lands by the Indians and of the long existence of these settlements as Indian villages.

The statement contained on page 17 of our adversaries' brief to the effect that "when a grant was made without special reservations in favor of the Indians it must be presumed that there were no valid Indian claims," if not contradicted by the evidence, might be of some force, but all the evidence in this case, as well as the evidence before the board of land commissioners upon Warner's petition for confirmation of his grant, shows distinctly that these Indians were in possession of these lands, and never abandoned the same, from a time long prior to 1840, when the grant to Pico was made.

The statement at the bottom of page 17 of the brief of defendants in error, to the effect that the Warner Ranch Indians were outside barbarians, incapable of ownership, and incapacitated for civilization, is contrary to the evidence in this case, which shows that these Indians were under the administration and government

of the San Luis Rey Mission until after its secularization, and after that and until the change of sovereignty still remained subject to the government of the "administrators" of the mission. (See testimony of Pico and Warner, rec. No. 209, pp. 44–48.)

The statement contained on page 18 of the brief in question, that the assent of the San Luis Rey Mission was obtained to Warner's grant, finds no support in the *expediente* of such grant. On the same page it is said, in referring to the inability of these Indians to withstand the disrupting force of an aggressive American civilization, "That this should be the case in such a short time (less than a century) shows that the Indians of southern California had no cohesion, no real tribal or governmental organization. Note how *persistent* have been the Indian pueblos wherever they have existed." We submit that it is not becoming for counsel here, engaged in their work of extermination of these Indians, to dwell upon the weakness of these people and their lack of persistency in sustaining their rights or adhering to their customs, as a justification for their eviction from these premises, which they and their ancestors have held for a time beyond the memory of man.

Counsel rely upon the fact that the Mission lands were, after the secularization of the Missions, subject to grant under the Mexican law, as showing that such law did not contemplate a further protection of the Indians' possessory rights. But this by no means follows, for the reason that the Mission authorities merely held their dominion and control over the Mission properties as a trust for the benefit of the neophytes, and

when the relation of trust was terminated, so far as the property interests were concerned, by the secularization of the Missions, it was but natural that no further rights of the Mission authorities should be thereafter considered in the Mission properties. But it can not be argued from this that those who were formerly beneficiaries of the Mission control and dominion over these properties, thereby lost their rights.

The *ipse dixit* of counsel to the effect that there was no cultivation of lands by the Indians in California prior to 1833, save at the Missions, is not only contrary to the history of such Missions, but is positively refuted by the testimony in this case. (And see Government reports in appendix to this brief.)

THE TREATY OF GUADALUPE HIDALGO DID PROTECT THE INDIANS' RIGHTS.

The argument of our adversaries directed to show that "no rights of any kind were reserved to the Indians under the treaty of Guadalupe Hidalgo" proves the very contrary, for it establishes that the civilized Indians were Mexican citizens and also that the "*property*" of all the "*inhabitants*" (whether citizens or not) of the ceded territory was protected by the treaty of Guadalupe Hidalgo.

That the word "property" includes usufructs, servitudes, and easements, as well as the complete title, there can be no question, and that the word "inhabitants" includes Indians is equally certain. On pages 37 and 38 of the brief of defendants in error, the impression is sought to be conveyed that only the rights of Mexicans,

as contradistinguished from those of Indians, were protected by the treaty; and on page 44 of such brief it is said: "It was only grants, and grants which had been perfected, that were protected by the treaty of Guadalupe Hidalgo." In direct refutation of these positions we call attention to the language of Justice Field in *Knight* v. *Land Association* (142 U. S., 161), where it is said (pp. 183–184):

> It is equally well settled that when the United States acquired California from Mexico by the treaty of Guadalupe Hidalgo, they were bound under the eighth article of that treaty to protect *all rights of property* [not merely property "owned by Mexicans"], in that territory, emanating from the Mexican Government previous to the treaty.

And, again, later the court says (pp. 200–201):

> The *inhabitants* were entitled by the law of nations to protection from the new Government in *all rights of property* then possessed by them. Jurisdiction and sovereignty passed from one nation to the other by the cession, but not private rights of property—their ownership remained as under the former Government. And by the term *property*, as applied to land, *all titles* are included, legal or equitable, perfect or imperfect. "It comprehends," as said by this court in *Soulard* v. *United States* (4 Pet., 511, 512), "*every species of title*, inchoate or complete. It is supposed to embrace those rights which are executory as well as those which are executed." In this respect the relation of the

> inhabitants [not merely Mexicans] to their Government is not changed. The new Government takes the place of that which has passed away.

WHO ARE "THIRD PERSONS?"

The gist of the argument of our adversaries on the subject as to who are third persons not affected by proceedings had under the act of March 3, 1851, is comprehended in the significant query in their brief at the top of page 55, which reads as follows: "Does not such nonpresentation remove him from the class referred to in the act of 1851 as 'third persons?'" This merely means that there can be no third persons under such act except those who have presented their claims for confirmation. This is made plain by the following quotation from page 78 of counsel's brief, namely: "But, as we have seen, there can not be any paramount title from the Mexican Government except such title as is evidenced by the decree of the board of land commissioners and subsequent proceedings under the act of March 3, 1851." And again, on page 80, it is said: "There can not be any 'superior title' that has not passed the sanction of the board." And the same position is again stated on page 68 of counsel's brief, as follows: "Their rights should pass through the sieve of the land commission before they can be made the subject of adjudication by the ordinary courts of justice."

We submit that no authority can be found anywhere sustaining this position except in the decision of the supreme court of California here under review; but that

all of the decisions which have treated of the subject show that third persons are such persons as were not required to present their claims under the act of 1851, but whose rights were protected by someone else presenting a claim for the same land and having it confirmed and patented.

In the case of *Ainsa* v. *New Mexico and Arizona R. R. Co.* (175 U. S., 76–83) the court says, in referring to the act of 1851 and the decisions of the land commissioners and the district court thereunder: "Any final decision should be conclusive between the claimant and the United States only, and should not affect third parties *unless they should intervene in the district court*, for which provision was made." It is thus apparent that it was not *compulsory* upon such third persons to intervene and present their claims, but that *if they did so*, they would be bound by the proceedings had upon their title.

One may be a "third person" not affected by proceedings had under the act of March 3, 1851, although he claims under title entirely independent of that which was presented and confirmed under such act, and although his rights are irreconcilably hostile to and utterly destructive of the title that was presented to and confirmed by the board of land commissioners.

We submit that no decision of this court can be found which holds that there must necessarily be some relation of trust or privity existing between the claim which was presented, confirmed, and patented and that of third persons not bound by proceedings had under

such act. The only requirement has been that the third person's claim should be prior and paramount to that confirmed. This view is emphasized in the case of *Interstate Land Co.* v. *Maxwell Land Grant Co.* (139 U. S., 569), where the act of Congress confirming title to certain land grants in New Mexico was under consideration. That act, in confirming the New Mexico grants, used the words "be and is hereby confirmed;" and section 4 of the act provided "that the foregoing confirmations shall only be construed as quitclaims or relinquishments on the part of the United States, and shall not affect the adverse rights of any other person or persons whatsoever." (See 12 Stat., 71.)

We showed in our main brief, by numerous decisions, that such was practically the construction of this court as placed upon proceedings had and patents issued under the act of March 3, 1851. When this fact is borne in mind, the significance of the following extract from *Interstate Land Co.* v. *Maxwell Land Grant Co.* (*supra*) is very important as showing that there need be no privity between the estate confirmed and that which is asserted as an adverse interest, namely:

> The action of Congress in confirming it, and the subsequent proceedings in the Land Department, together with the proceedings in the courts to set aside the patent, have certainly settled those questions forever. *True, those proceedings do not estop a party claiming the same land under a prior grant from the Mexican Government.* But to succeed in his claim he must recover on the

> strength of his own title. In other words, he must establish the validity of his own grant in order to defeat a subsequent grant which has been adjudged valid in proper legal proceedings. The confirmation and patent of the grant in Beaubien and Miranda operated to divest the United States of all their rights to the land embraced in the grant which this country acquired from Mexico by the treaty of Guadalupe Hidalgo. *And the only way that the grant can be defeated now is to show that the lands embraced in it had been previously granted by the Mexican Government to some other person.*

We recognize that the italicized language in the above quotation is in conflict with the doctrine of *Houston* v. *San Francisco* (47 Fed. Rep., 339), analyzed by us in our main brief. But, as we pointed out in that brief, this question was not raised by the motion in that case, was not within the issues before the court, and was not necessary to the decision, and therefore such decision can not be considered as conclusive authority on that subject. We do not consider the point important, however, as in our view in the cases at bar a privity of estate did exist between the Indians holding the beneficial title and the Mexican grantee holding the legal title; but if it should be held that the Indians were strangers to the title, then we submit that this does not prevent them being third persons not bound by the proceedings had under the act of March 3, 1851, provided their title was "prior and paramount" to that presented and confirmed, although entirely independent of and absolutely hostile to such confirmed title.

Such a construction of the act is in entire harmony with its scope and purpose, which was primarily to segregate private property from public domain, and when this was done, the purpose of the act was accomplished and existing rights as between parties were not affected, whether they were based upon the same or independent titles; and any *apparent* concessions made by us to the contrary in our main brief we wish distinctly to disavow here, as no real concessions were made.

SERVIDUMBRES.

We are very much indebted to counsel for defendants in error for furnishing us in the appendix to their brief the extracts from the old Spanish *partidas* which so fully corroborate and sustain Escriche's definition of the Spanish word *servidumbres*, upon which we rely. We call the court's attention to the first paragraph of Law 1, page 118 of counsel's brief, in which the following is said:

> *The sages have properly said that a service* [*servidumbres*] *is the right and use which one man has in the holdings and estates of another, to use them for the benefit of his own.* * * * There are likewise other services which a man has in the things of another for his personal advantage, not for the particular advantage of the estate, *as where he has the usufruct of gathering the products of another's estate, or the use of the house in which he dwells or the houses of another.*

In law 14 of the *partidas* (p. 120 of counsel's brief) it is shown that a servitude may be imposed by the

voluntary act of the proprietor in consideration of affection or for value, or may be acquired by prescription. This is all we ask. If an individual out of consideration for the needs of another can impose upon his estate a servitude in favor of another, it certainly will not be questioned that a State, in its bounty and in its consideration for the interests of a helpless and defenseless people, can do likewise.

Power to grant the entire title is conceded to have been in the Mexican nation. This certainly included power to impose a servitude, as the greater power includes the lesser, and this power may be exercised either by specific grant or by the operation of general laws.

THE HARSH ATTITUDE OF DEFENDANTS IN ERROR TO THESE INDIANS.

The spirit and purpose of this case, even when the best and most commendable phase is put upon the controversy, can not address itself to the sense of justice or to the kindly sympathy or consideration of a court; and those charged with presenting the matter might well have refrained from unnecessarily flaunting before this court, with apparent indifference, their utter disregard for human rights. They might, with apologetic mien, have pleaded extenuating circumstances (if they could have found them) in justification of this suit, the outcome of a relentless spirit of greed that has crushed out every better and humane impulse of the owner. They might at least have expressed some sympathy for the helpless victims of their course, but

instead they justify themselves by calling the defendants "wandering and worthless beings," and by upholding the theory of one of the witnesses that the only good Indians are dead Indians. They also seek to create the impression that these Indians were savages and were bloodthirsty marauders by referring to the outbreak against Warner in 1851. The testimony clearly shows, however, that this outbreak was incited by a white man by the name of Marshall, whom it is conceded was Warner's former foreman. It also appears from the evidence that this outbreak of the Indians resulted from Warner's assertion of title to a vineyard claimed by the Indians (Tr., p. 34).

THE HARDSHIPS AND SUFFERING THAT WOULD RESULT FROM AFFIRMING THE DECISION OF THE CALIFORNIA COURT.

We wish to call the court's attention to the great hardship that the plaintiffs in error would sustain if the decision of the California supreme court were affirmed. Probably no decision ever rendered by that court has caused as much human suffering as would follow the enforcement of the decision rendered by a bare majority of that court in this case, as it would make homeless and without means of support several hundred helpless human beings, whose training, experience, traditions, patriarchal mode of life, and simplicity of mind utterly unfit them for the sterner and more crushing conflict of our aggressive civilization. The gravity and utter helplessness of the situation of these people can hardly be overestimated.

They are mere children without a father, wards without a guardian, homeless upon the ground where they and their ancestors first saw the light of day, and where they have lived in peaceful pursuits from a time beyond the memory of man We are here invoking the favorable action of this court, not to aid in the establishment of some new doctrine of law, or of some novel and dangerous precedent, but merely to uphold and stand by the law of the State as fixed, determined, and adjudged by the unanimous decision of its highest judicial tribunal sitting in banc, after careful and thorough consideration, and which has remained undisturbed as a rule of property in California for nearly twelve years. Even when unsupported by considerations of humanity, the doctrine of *stare decisis* stands as one of the pillars of our judicial structure. The public welfare and the certainty of the law demand it, and it is well settled that this wholesome doctrine should never be disregarded "unless it is necessary to prevent continued injustice or in vindication of clear and obvious principles of law." (Wells on *Stare Decisis*, sec. 598.) How much more sacred and binding, therefore, should this doctrine be considered when invoked in support of obvious justice and humanity.

II.

The propriety of final decision on the merits by this court in the present proceeding.

The court may fitly decide as to the sufficiency of the record evidence as well as on its relevancy. As

the court perceives, the State courts passed only upon the admissibility of the Indian evidence and, excluding the same, gave no consideration to its sufficiency as to the merits. Nevertheless, all the essential evidence on both sides of the controversy is in this record and before the court. If the case went down for new trial or further proceedings in conformity with the opinion here, no new testimony would be adduced. The case was made up below in chief, in defense, and in rebuttal, as if the merits were to be heard, and the record shows this, although the evidence was subsequently excluded from consideration (both records, *passim;* Barker record, p. 61, fol. 105; Quevas rec., p. 30, fol. 51). Why, then, we respectfully ask, should the case be sent back for a new trial (a jury was waived; rec. 209, p. 13; rec. 210, p. 14) and review by the same State courts which determined the controversy in its present stage? It is not likely that any decision by those courts will be accepted as final; and as the right to come here after determination on the merits below appears to be clear, the case would doubtless come back here for review on the merits after decision thereon below.

We therefore respectfully and earnestly submit that the court should take this entire controversy now for final decision on the essential question involved. All the parties are here, all the evidence is before the court; we do not understand that the defendants in error object to this prayer. It is particularly fitting that the Supreme Court of the United States should settle conclusively, whenever it is possible, such In-

dian rights as are here in question, as being an issue of national concern and importance. This course will avoid delay; prompt settlement of litigation is a principle and policy which may always be invoked with propriety. The court has under similar circumstances adopted this course when a *venire de novo* or remand was the ordinary and usual proceeding. (*Stanley* v. *Schwalby*, 162 U. S., 255, and cas. cit.) We presume the court may take this course whenever they deem it advisable; and while, perhaps, in the review of a case coming from State courts, the course suggested might not ordinarily be considered judicious. we respectfully suggest that under the present circumstances no real ground of objection exists.

The national source of the plaintiffs' title, as well as the Indian relations, make the case appropriate to be decided here on the present record. And the force and bearing of this suggestion is, we think, illustrated by the following quotations from the language of the courts below:

> By the issuing of said patent and the confirmation of the grant therein mentioned, the *Government of the United States purported and intended to convey* said lands and premises *absolutely without regard* to the rights or claims of any of said defendants. (Finding XIV of trial judge, Rec. No. 209, p. 18.)
>
> 1. That the decision of the land commissioners and other appropriate officers of the *Government of the United States*, holding to the effect that the land in question was at the time

it was granted *vacant and subject to absolute alienation, is conclusive on the defendants and all others.* (Opinion of appellate court, id., p. 80.)

Upon the words italicised we remark, as we have done in our main brief, that none of the proceedings or decisions or the patent assert or create any such title. On the contrary, the patent was issued with the stipulation that "* * * neither the confirmation of this said claim nor this patent shall affect the interests of third persons" (p. 23, Rec. No. 209). Such judicial conclusions on these records invoke the prompt exercise of this court's full and radical power of correction.

III.

The Agua Caliente grant includes all holdings under the Warner patent (No. 209) used by the Indians. Unquestionably its conditions attach to the plaintiffs' title. Equally, the Indian right attaches under the Portillo patent (No. 210).

The plaintiffs' total acreage in the "tract of land known as the *Valle de San Jose* and *Agua Caliente*" amounts to 6 square leagues (see patent in No. 209, Rec., p. 21), say, in round numbers, 27,000 acres. (P. 21 of the Jackson and Kinney Report cited in appendix.) The Indian claims are for the ancient possession and use of three parcels of 1,907, 266, and 120 acres, respectively (court's findings VII, IX, XI, Rec. No. 209, pp. 15–17), amounting in all to 2,293 acres. The valley was divided into northern and southern portions, corresponding respectively to the *Agua Caliente* grant to

Pico and the *Valle de San Jose* grant to Warner. (See stipulation or admission in record, No. 209, p. 22, fol. 37, and opinion of board of land commissioners, p. 54, fol. 94.)

There can be no question that the old settlement of Agua Caliente (the main Indian village) and the other two Indian "rancherias" are on the *Agua Caliente* or Pico grant. There is no Indian settlement in the *Valle de San Jose* or Warner grant. This record, historical records, and public reports (see Appendix) abundantly show this.

The Pico grant expressly reserved the Indian rights. Warner's petition specifically relies upon the Pico grant. The patent therefore, in effect, incorporates that grant in his tract and title. The patent on its face stipulates for protection to such interests as those of the Indians. The *expediente* of the Pico grant expressly and repeatedly reserves the Indian claim, the grantee himself fully recognizing it. Considering all the circumstances, considering the function of the land commissioners under the act of 1851, which was to determine merely the land claimants' right as against the public or governmental interest—which was not intended to create or define the petitioners' estate—surely expressions used in the land commissioners' opinion (Rec. No. 209, pp. 54, 55) can not vary the true facts in this case or weaken the principles to be applied. After all, the commissioners merely say that the description of the two parcels of land and *expedientes* shows that the Warner grant embraces the premises described

in the previous grant to Pico; that while the evidence before them fails to show that Pico completed the conditions of his grant and permanently occupied the premises, nevertheless, if there were any interest remaining in him the claimant has succeeded thereto by conveyance. These suggestions are not very positive, nor do they reach very deep into the merits of the case. Pico's rights were not before the commissioners, nor were the Indian claims. The commissioners' remarks, therefore, on the Warner grant as controlling, were unnecessary and gratuitous and should not operate to rule the present controversy. Warner claimed the *Agua Caliente* tract on the Pico grant and only the *remainder* of the valley on the *San Jose* grant to himself; it never appeared that he had performed the conditions of his own grant, which conditions were particularly repeated in nearly every document of his *expediente*. He only thinks he "made the arrangement called for in the expediente in reference to the property." (Rec., 209, p. 47.) Surely he and his successors in title are estopped from impugning the Pico grant. And beyond question this bare statement in outline of the legal foundation of the Indians' rights in reference to their moderate claims on the vast tract of land covered by the Warner patent, shows that their position is impregnable and can not be overthrown consistently with the real facts of the case or the true interpretation of the law.

As to Warner's own grant, the Valle de San Jose, for the *remainder*, even if held to embrace the entire valley

so as to overwhelm or displace the Pico grant, the reservation of the Indian rights therein is by express though general language, namely, by the word *servidumbres*, standing for just such an easement, usufruct, or "usage" as is shown in this case. Without such reservation the law protects them—the Spanish or Mexican law which our courts will apply to this situation—by the uniform recognition or imposition of the Indian occupancy as a condition of all such grants.

As to the other patent, that of Portilla or Portillo, whose claim under the Mexican grant was rejected by the land commissioners, but allowed on appeal to the United States district court and to this court (Rec., 210, pp. 21, 24, 25), the same general reservation of Indian rights by the word "*servidumbres*," translated as "servitudes," is shown by the *expediente* of that grant (id., p. 22). This tract adjoins the tract of the Warner patent, bore the same name as that of Warner's "remainder," although the latter strictly is called *Rancho San Jose del Valle* and the former *Rancho Valle de San Jose* (e. g., p. 20, Rec., 209; p. 18, Rec., 210; Report Special Agents Jackson and Kinney, p. 20, see Appendix), and is now generally known as part of the plaintiffs' "Warner ranch property." The tract in No. 210 contains 17,624 acres (Rec., p. 21) and the three Indian tracts therein involved are villages known by the special names of Mattaguay, La Puerta, or Puerta Nori, and San Jose (id., pp. 23, 24), and contain respectively 118, 70, and 37 acres (findings of court in No. 210, VII, IX, XI; Rec., pp. 16, 17, 18; see also Reports in Appendix).

IV.

Brief recapitulation of the law of the case.

This case is exactly ruled by *Byrne* v. *Alas* (74 Cal., 628); and *Botiller* v. *Dominguez* (130 U. S., 238), is not in the least inconsistent therewith on any proposition involved here. The supreme court of California thought otherwise by a bare majority, and we respectfully commend the dissenting opinions of Chief Justice Beatty and Justice McFarland (in which Justice Temple concurred) to the attention of the court (rec. 209, pp. 81–82). As this case and *Byrne* v. *Alas* are in all substantial respects identical, it may justly be urged that the Indian rights herein have been confirmed and assured (if not in strictness established and vested) by the decision in *Byrne* v. *Alas*, in accordance with the well-established principle that where a right is dependent upon and has become established or vested by a final and conclusive judicial decision, if the authority of such decision is afterwards weakened or overthrown, this result will not be permitted to disturb the right so recognized. This principle may properly be invoked here as part of the general principle of *stare decisis*. Beside such authorities on this doctrine as A. & E. Enc of Law, vol. 23, ed. 1893, p. 31, citing the case of *Seale* v. *Mitchell* (5 Cal., 403), and Wells on Res Adjudicata and Stare Decisis (pp. 542, 545, and auth. cit.) *Grignon* v. *Astor* (2 H., 319, 343), we may call the court's attention to its decision handed down on the 18th instant (Board of Commis-

sioners of *Wilkes County* v. *Coler*, No. 167), which, although applied to quite different facts, seems to declare that when the rights of parties have been determined by the law of the State as it exists at a certain time, a change in that law as enacted by the legislature or construed by the courts will not be permitted to affect such rights. (See also *Reed* v. *Ownby*, 44 Mo., 204; *Pioche* v. *Paul*, 22 Cal., 105; *Hihn* v. *Courtis*, 31 Cal., 398.)

Byrne v. *Alas* decided that Mission Indians whose use, occupation, and possession by themselves and their ancestors of lands included within a Mexican grant from a time prior to the establishment of the Mexican Government has been continuous, are entitled to remain in such occupancy against a patentee from the United States and his grantees, although they never presented their claim to the board of land commissioners under the act of March 3, 1851. The opinion in this case considers the general status of such Indian rights under the policy and law of the nations who discovered and settled this country and under the Spanish and Mexican law relating to pueblos and ranchos, and also quotes from an early report to the Secretary of the Interior upon the Mission Indians.

Botiller v. *Dominguez* decided that a complete and perfect title from the Mexican Government, as well as an imperfect and inchoate title, must be submitted to the commissioners under the act of 1851; "that no title to land in California dependent upon Spanish or Mexican grants can be of any validity which has not been

submitted to and confirmed by the board provided for that purpose by the act of 1851," or by the district court or Supreme Court of the United States The chief effect of that decision was to hold that perfect titles as well as imperfect titles must be so submitted and confirmed; from which it resulted that the grantee in that case should have presented his claim even if his grant were perfect. But it must be noted that the grantee claimed the fee-simple title, that no claim whatever under that title had been presented to the board; no patent had ever issued from the United States to *anyone* for the land, and that the defendants who occupied the land had improved and cultivated it and were in possession of it as preemption or homestead settlers under the claim that the tracts were public lands of the United States. It can not be doubted that the chief purpose of the act of 1851 was to determine this very question, namely, whether or not the lands were a part of the public domain. Nor can it be doubted that the claimant or claimants under the unpatented grant (the rights appertaining to which had been neglected by the original grantees or their successors), and not the homestead settlers, were the real intruders.

The decision itself, after reviewing the act of 1851 and pointing out that the act attempts no distinction between claims which are perfect and those which are imperfect in their character, notes that the main purpose of the statute was to separate the public domain from private property: "when this was done, the aim of the

statute was attained." It is evident that the court may not be held to imply absolutely without limitation the conclusion that each and every right or title derived from the Spanish or Mexican Government, whether legal or equitable, should have been presented to the board of land commissioners under the act of 1851, so as to include the rights of "third persons," because the language of the decision in reference to the fifteenth section of that act is that patents issued thereunder "shall not include the rights of anybody else [than the United States and the claimants] if in a position to contest the action of the board." Necessarily, the court had in mind in what was thus said the concluding clause of section 15, namely, "shall not affect the interests of third persons." The only question remaining, then, is whether or not parties in the situation of these Indians are such "third persons" protected by the very language of the act of 1851.

Since there can be no doubt that these Indians under their immemorial tribal or family possession held a prior and paramount claim of occupancy and use, which was not inconsistent with the legal title in fee, which under Spanish and Mexican usage and law, as well as under the law of this country as laid down in the decisions of this court, was a universal and necessary condition of title to lands wherever Indian occupancy existed, the Indians here come within the most strict definition of the cases as to those who are to be considered "third persons" in respect to section 15 of the act of 1851. (*Houston* v.

San Francisco, 47 Fed. Rep., 337, 340.) Thus these Indians having an equitable claim or right, rather than a title of any sort, may take the benefit of the act performed by the plaintiffs' predecessors, whose legal title was confirmed and patented, but necessarily subject, as we contend, to the Indian right. Irrespective of section 16 of the act of 1851, the Indians are third persons, whose prior and paramount claims were not required to be presented to the board; and when that section is considered the conclusion is irresistible that Mission Indians are of all others the "third persons" first and chiefly in the mind of Congress.

While the case of *Botiller* v. *Dominguez* overruled *Byrne* v. *Alas* so far as to hold that perfect grants as well as imperfect grants must have been presented to the board of land commissioners for confirmation, neither that case nor any other case holds that it was necessary to present for confirmation the claims of third persons. The distinctions to be drawn with respect to Federal and State authorities which we have cited in our main brief have there been sufficiently discussed, and are so admirably indicated in the *Botiller* v. *Dominguez* opinion that we need dwell no further upon the law determined by that case. It is, however, worth while to point out to the court that Mr. Justice Miller therein indicated (pp. 251, 252) the similar situation existing in Florida and Louisiana under the cessions by Spain and France, and the differences between the tribunals which investigated and passed upon claims in those instances, generally, and

under the act of 1851 in California; by which it appeared that the earlier laws merely directed the commissioners to examine claims and report to Congress, which reserved the right to reject or confirm such reports, while the act of 1851 established a tribunal, judicial in its character, whose decisions should be final without further action by Congress.

There was just one respect in which Congress left the situation under the act of 1851 exactly as it was under the earlier laws of the same nature, and that was in reference to the Indian claims; for section 16 of the latter act provides that the commissioners are to ascertain and report the tenure by which the Mission lands are held and those held by civilized Indians and Indians engaged in agriculture or labor of any kind, and those occupied or cultivated by pueblos or rancheros Indians. This provision of section 16 makes it, we contend, very clear that among the "third persons" of section 15 the Indians specified are necessarily included, and, indeed, are chiefly pointed out, because they were in the mind and intention of Congress in that very connection.

It should also be borne in mind that an essential difference in facts makes a necessary difference in the relevancy or application of legal principles. Thus, the language of the decision in *Houston* v. *San Francisco*, *supra*, strictly defining who were to be considered the third persons of the act of 1851, was uttered with relation to the claim there, shown not to be founded in *bona fides* and brought forward after the passage of

years in behalf of parties who were claiming to interfere with established municipal and individual rights in the city of San Francisco as successor to the pueblo.

And so *Beard* v. *Federy* (3 Wall., 478), as well as the case in which it is last cited and approved, *Thompson* v. *Los Angeles Farming Co.*, decided at the present term (see 180 U. S., 72), show that the court has in view the question who is the real intruder, the title claimant or the claimant of the possession. And the term "third persons" was by that case justly held to embrace not all persons other than the United States and the claimants, but only those who held superior titles, in which class the long anterior and highly meritorious rights of these Indians surely fall.

In the case of *Mitchell* v. *Furman*, recently decided (March 11, 1901), the court reviews the decision of *Botiller* v. *Dominguez* in respect to the light which it casts upon the laws applying to Spanish grants in Florida, which were similar to the act of 1851, and reaches the following conclusion:

> We are of opinion that these acts applied and were intended to apply to all claims, whether perfect or imperfect, in that particular resembling the California act; that the courts were bound to accept their provisions, and that there was no want of constitutional power in prescribing reasonable limitations operating to bar claims if the course pointed out were not pursued.

Thus by this very recent decision it is evident that the chief point, perhaps the only point, determined in

Botiller v. *Dominguez* was that perfect as well as imperfect claims must be submitted to the land commissioners under the act of 1851 respecting private land claims in California.

Nor is anything contained in other recent authorities which weakens the contentions we have made.

In *United States* v. *Santa Fe* (165 U. S., 675) it was held that an inchoate claim which could not have been asserted as an absolute right against Spain or Mexico, and was subject to the uncontrolled discretion of Congress, is not within the operation of the act of 1891 creating the existing Court of Private Land Claims. The decision points out that the act of 1891 confers a narrower authority to adjudicate land claims than the act of 1851. The earlier act authorized adjudication of any right or title and conferred the power to presume a grant in favor of a town. The later act omits the power to invoke this presumption and excludes any claim the completion of which depended upon the grace or favor of Spain, Mexico, or the United States as successors to these Governments. And it should be noted that the petition in that case claimed a tract of 4 square leagues as vested in the city merely by operation of law, upon a record which contained no proof as to the possessory claims of lot holders in the city, or as to the actual possession by the city, whose rights the opinion characterizes as "pretensions."

So in the case of *United States* v. *Sandoval* (167 U. S., 278), the *jus disponendi* remaining in the Government is established upon a record presenting the same considerations as that of the Santa Fe case just referred to, and

therefore the reasoning and conclusions of the latter case were decisive; while in the case of *Pueblo of Zia* v. *United States* (168 U. S., 198) the point determined was that a certain claim of the pueblo was shown by the documents to have been a mere right of pasture—the applicants prayed to have the tract *considered as their pasture ground.* And the statement of the court's conclusion, namely, that the instruments did not vest title in the pueblos, but were a mere license revoked by subsequent grants or by the treaty of Guadalupe Hidalgo ceding that entire territory to the United States, shows in itself that the circumstances and instruments there should not affect the very different nature and wider scope of the Indian rights here. Such rights, as we claim, always operate as a perpetual condition or trust engrafted upon the fee; and therefore under the Mexican grants and the United States patents there was not the revocation of a mere license, but the completion of a title, which, by the very fact of completion, stood for the protection of this included condition or trust.

In *United States* v. *Conway* (175 U. S., 60, 71) the last paragraph of the opinion establishes precisely the same point in reference to the present Court of Private Land Claims act as we have made regarding the act of 1851, namely:

> The main object of the Court of Private Land Claims is to ascertain and determine whether the land claimed as private property under the treaty is in fact private property, or, on the contrary, is public property. In the latter case, of course, a confirmation is refused; in

> the former case, a confirmation is made if the claimant appears to have, as between himself and the United States, the right to it, *but subject to the rights of others who are at liberty to assert their superior title in the local courts.*

Dwelling, now, somewhat on section 16 of the act of 1851—it provides:

> That it shall be the duty of the commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the Mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by pueblo or rancheros Indians.

It is impossible to understand or give force to this section unless it be appreciated that it was in the purpose of Congress, in harmony with the general policy of the Government, to exercise a paternal supervision and control over all the affairs of the Indians, and to reserve to the political branch of the Government an absolute jurisdiction over their persons and property rights, somewhat in the nature of a guardianship or curatorship. They are "the wards of the nation." Section 16 has its complement in subsection 2 of section 13 of the act of March 3, 1891, creating the Court of Private Land Claims, viz:

> No claim shall be allowed that shall interfere with or overthrow any just and unextinguished Indian title or right to any land or place.

This provision has been construed by the Supreme

Court in the case of *United States* v. *Conway, supra*, and a number of pertinent cases are cited.

When Congress delegated to commissions and courts the power to exercise one of its functions, it was its intention so to limit the exercise of that power that whatever rights the Indians possessed were not to be affected in any way, but they were to be dealt with afterwards by the political branch; that consequently the confirmations of the commission, and patents issued by virtue thereof concerning lands in which the Indians had any interest were without influence upon the status of and were subject to their rights in the lands. These rights were susceptible of determination and disposition by Congress alone, and the manner and procedure of such disposition were reserved to it. Therefore, regardless of any proceedings before the commissions and the courts, the *status quo* of the Indian interest was to be preserved, to receive the solicitous care and action of Congress when it might be so disposed. The records of Congress and the statute books are filled with convincing evidences of the continued solicitude and concern which the political department of the Government has always had in the affairs of the Indians and all matters in which they were interested, even remotely. This history also shows that because of their political disabilities and their peculiar relation to the State, in the delegation of any of its functions Congress has always jealously and zealously safeguarded the rights and interests of the Indians. The sixteenth section of the act of 1851, like subsection 2 of section 13 of the act

of March 3, 1891 (Court of Private Land Claims act, 26 Stat., 854), evidences this continued policy of Congress and shows that the Indian rights and claims were reserved from the jurisdiction of the commissioners under the act of 1851.

We are unable to discover whether or not the commissioners performed the duty imposed upon them by section 16 of the act of 1851, and made the report to Congress which was directed. But even if they did not do so, this makes no difference. The important point is the intention of Congress on the subject, and that is clear beyond dispute.

We earnestly contend and respectfully submit that one of the two following propositions must be accepted as the undisputed law of this case: Either—

1. That the Indian occupancy attaches to the fee and is entitled to the benefit of the proceedings under the act of 1851 as a right reconcilable with and not hostile to the title in fee; or

2. By virtue of the provision respecting "third persons" in section 15 of the act of 1851, and especially by virtue of section 16 of that act, plainly withdrawing the Mission Indian rights from the *judicial* functions of the commissioners under that act, the Indian claims were not cut out by the patent, and remain *in statu quo.*

The syllabus in the case of *United States* v. *Chavez* (id., 509), is a clear statement of the broad principle for which we contend, namely:

> Upon a long uninterrupted possession of lands in Mexico, beginning long prior to the

> transfer of the territory in which they were situated to the United States, and continuing after that transfer, the law bases presumptions as sufficient for legal judgment in favor of the possessor in the absence of rebutting circumstances, which do not exist in this case.

The recent case of *Pablo Maese et al., appellants*, v. *Hermann, Commissioner, etc., et al.*, in the court of appeals of the District of Columbia (Washington Law Reporter, vol. 28, p. 694), is an illustration of the extent to which our courts in passing upon Spanish and Mexican grants regard the Spanish law or system, especially in reference to such conditions of trusts and rights of occupancy as are here shown. In that case it was a pueblo grant, and the decision holds, after reviewing the history of the particular grant (Las Vegas) that the land embraced in the grant was not intended to be assigned or transferred in absolute property to the grantees and their heirs, "but was intended to be held by them in trust for the benefit of the inhabitants who might settle thereon."

> Such rights as were conferred by this grant were of a communal nature and such as are recognized by the modern civil codes of continental Europe, and especially by the laws and customs of Spain, and which have been largely recognized in the laws and ordinances adopted for the settlement and government of her colonies on this continent. (Id., p. 700.)

The rights of these Indians of southern California, so related to the Missions there, were obviously assim-

ilated to these communal rights of pueblos, and should be judged and protected as analogous and based upon the same legal and equitable principles.

V.

Justice and equity combine with law to make the case for the Indians impregnable.

We need not discuss further the great authorities and the general rules relative to Indian rights in the soil. While *Fletcher* v. *Peck*, *Cherokee Nation* v. *Georgia*, *Worcester* v. *Georgia*, and *Johnson* v. *McIntosh* deny to the Indians complete title to this country as against discoverers and settlers, and deny to them full rights of sovereignty, all these cases determine that the Indian title is occupancy and the Indian right of occupancy is sacred. These principles were adjudged in reference to our own Eastern and Northern aborigines, the wild and savage bands whose claims do not present so strong an appeal as the more civilized and Christianized Indians of southern California.

Byrne v. *Alas* quotes from a certain Government report (p. 634) as to the difference between the standing of Mission Indians and the "wild or wandering tribes" of Indians under Spanish law.

One of the more recent statements by the court of the general position of the Indians is the following, taken from *Beecher* v. *Wetherby* (95 U. S., 517, 525), in which Mr. Justice Field delivered the opinion of the court:

> But the right which the Indians held was only that of occupancy. The fee was in the United

> States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race.

The Indian evidence in this record, and that of the Spanish and American witnesses in their behalf, bears its own internal proof of genuineness and *bona fides*, and shows beyond question as a fact accurately established the long occupancy of the Indians. (Rec., 209, pp. 33–53.) The clear and strong inference from all the facts shown here, and known historically in relation to the discovery and settlement of that country, is that the use and occupancy of these Indians and their ancestors has been immemorial. The native races were, of course, in that country long before the Spaniards—exactly how long, no one can say. The Missions established throughout California in the last quarter of the eighteenth century sought the Indians in their native homes. This was an especially fertile and attractive valley, and possessed a spring which doubtless has been famous for generations, being used for its remedial baths, and also (though a hot spring) for irrigation, as the testimony shows. We do not need such statements as those made by Mr. W. J.

Magee ("The Old Yuma Trail," National Geographic Magazine for March, 1901) as to village sites, watering places, and irrigation, to assure us that the Indians as prehistoric irrigators engaged in a ceaseless chase for water in southwestern America, and were sure to be established in their primitive village life about every available spring.

As to the suggestion of abandonment by the Indians, we think our main brief shows that it would pervert the record to draw that consequence from the references to the San Jose portion of the Warner grant as "vacant," since that word relates merely to the San Diego Mission's use and cultivation. It is manifest from the case of *United States* v. *Arredondo* (6 Pet., 691, 747, 748), that in reference to an assertion of abandonment by the Indians, Spanish law seems to have followed a legal proceeding in the nature of an inquest of office as a judicial act, followed by a sentence of the intendant in his official character on the report of the attorney and surveyor-general. And even then the Indian right of occupancy was reserved whenever it should be resumed; that is, if the abandonment was voluntary, the Crown's dominion was unimpaired in plenitude; if by force the Indians always had the right to return whenever they had the power and inclination to do so.

In reference to these foregoing points and other considerations involved in the case, we beg to call the court's attention to certain authorities and reports cited in the appendix to this brief.

These Indians are certainly not intruders on these lands. No one could undertake to say when they or their ancestors have not resided there. Where would they go if they were driven off? Such eviction (officially recognized, so to speak) would be a new thing in this country. Even if it were right to send these aboriginal Acadians from their immemorial home, no new territory has been set apart or provided for their reception. Always heretofore, and in reference to nations of Indians whose cruel and savage attacks on the whites can not be denied, the United States have regarded the Indian titles and claims, and have extinguished the same under treaties, by purchase, or by allotment of equivalent lands. This programme has always been scrupulously carried out in the past by the United States. It is notorious that the case of these Mission Indians has constituted now for over fifty years one of the strongest appeals contained in the whole story of the Indians' relation to the United States. Must these Indians be driven into the ocean, a few leagues to their west? There are no isles of the sea there to receive them. It may be that the plaintiffs herein (as has happened before in the history of the Government), if they should unhappily succeed in dispossessing the Indians, would be willing to sell to the Government for a substantial sum the small Indian parcels contained in the very large tract which originally they obtained from this Government (in effect) for nothing.

The California act of April 22, 1850 (Stat. Cal., 1850, p. 408), shows what the people of California

thought at that time regarding the Indian situation; for it provided that proprietors of lands on which Indians are residing shall permit them to continue their residence unmolested in the pursuit of their usual avocations, and may, if they wish, have a sufficient amount of land for the necessary wants of the Indians, including the site of their village or residence legally set off, without, however, making a selection to the prejudice of the Indians; and that the Indians shall not be forced to abandon their homes and villages where they have resided for a number of years. We can not discover that this act has ever been repealed; it may have become obsolete. But the act of January 12, 1891, providing a partial and tardy relief for the Mission Indians, refers in its sixth section (26 Stat., 712) to this California act of April 22, 1850, as being the basis of the Indian rights along with the original grants from the Mexican Government. And the view of Governor Downey (whose estate is prosecuting this suit) on the justice and equity of the case is shown by a letter, dated October 10, 1874, which he wrote to Special United States Commissioner Charles A. Wetmore (Report of Charles A. Wetmore, special United States commissioner of Mission Indians; Washington, 1875; p. 17; see appendix), in which the governor says:

> I am glad you have been appointed commissioner to these poor, unfortunate, deserving, and neglected Indians. * * * The Government has stood by and sanctioned the robbing of the Mission lands that were intended by the Spanish

and Mexican Governments for neophytes. They have lavished millions on less deserving human beings than these docile creatures. Now, in the name of humanity, urge something in their behalf.

All that the Indians wish is that the *status quo* shall be preserved, so that they may go on as through generations past and cultivate the fenced portions of their small tracts and pasture their cattle on their moderate holdings outside the fences with some assurance that the Government survey of their tracts (Rec. 209, pp. 50, et seq.; Rec. 210, p. 30) as situated in the midst of the plaintiffs' great holdings (which are measured by the square mile) shall be regarded as a final and assured delimitation of their rights.

Respectfully submitted.

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APPENDIX.

THE PRINCIPLE OF INTERNATIONAL LAW: JUDICIAL NOTICE OF SPANISH LAWS.

"According to that code [the law of nations] a change of government is never permitted to affect pre-existing rights of private property." (*Dent* v. *Emmeger*, 14 Wall., 308, 312.) This principle is stated in *Strother* v. *Lucas*, (12 Pet., 412), in which the court discusses generally the laws, usages, and customs of Spain in relation to the grants, transfers, and tenure of village property.

United States v. *Turner* (11 How., 663), decides that Spanish laws prevailing in United States territory before its cession, and affecting titles to lands there, must be judicially noticed by the court, and their existence is not matter of fact to be tried by jury. Otherwise, title to lands in States afterwards created out of such territory would be unstable and hence insecure.

MR. CUSHING ON INDIAN RIGHTS OF OCCUPANCY.

The view at one time current that Indians might be ousted by white settlers is thus disposed of by Mr. Cushing (7 Op., 293, 299):

> There is one other idea, * * * namely, that any white settler may rightfully take possession of any of the lands occupied by the Indians, and oust them prior to the extinguishment of their occupancy title by the United States. This idea is too absurd to admit of reasoned reply. Suffice it to say that a white settler has the same

> right thus to oust Indians as he has to oust white men, and no more; that is, the right to substitute robbery for purchase, and violence for law.

We do not mean to suggest that the holders of the title here are in the same position as such white settlers; nevertheless, Mr. Cushing's forcible language applies in a measure to any claim of civilized white men to lands occupied by Indians, whose right of occupancy was manifestly established and has never been lost or extinguished.

> All land titles in America, *at least all held by men of European race*, are deduced from the Government. (8 Op., 333.)

ABSTRACT OF CERTAIN GOVERNMENT REPORTS.

Report of Charles A. Wetmore, special United States commissioner of Mission Indians, Washington, 1875 (not published as an executive document), discusses the era of missionary establishments, and shows that the San Diego mission was founded July 16, 1769, and the San Luis Rey June 13, 1798. He says: "The missionaries were performing a semi-religious, semi-political work, aided by the authority and power of Spain. They gradually assumed control of the entire coast. The Indians were by degrees brought under subjection and gathered in towns in the vicinity of the missions, where they were instructed in a rude system of agriculture and in a few of the arts necessary to the lowest grades of civilized life (p. 2).

> The Indians have been forced by superior power to trade their patrimony, etc., until they have, as the Mission Indians in California, simply the right to beg. * * * They have begged in vain for legal rights. Their right of petition to Congress has been ignored. All this

distress might have been avoided if the Franciscan Fathers had secured grants in fee of the mission lands, to be held as designed in trust for future allotment among the neophytes in civilization, etc.

The report then shows how Southern California prospered through the industry and social order brought by the missions, and gives figures for population and property in 1826. In 1822 Mexican independence was declared. Under the sway of Mexico California became the field for Mexican schemers and land grabbers. "Private grants were repeatedly issued for all the available valleys on the California coast," etc., the result of which was that after the law of secularization of the missions was passed the mission lands were "divided up among a few influential Spanish and Mexican families, and the prosperous, self-sustaining Indians were made vagabonds and beggars without hope by act of law." The encroachments upon the Indians are shown under the rancheros first, who allowed the Indians to cultivate small patches of land and then, in the era of the squatters and farmers, until the Indians lost all their traditionary and customary rights "and are just now everywhere trespassers on the land—vagrants and troublesome neighbors to the whites. They still support themselves partially by cultivation of the soil, but they have no undisputed titles (except in one or two instances of special Mexican grants to Indians) to their homes" (p. 5).

This report also calls upon the Government to adjust and determine the rights of Indians on public lands, with due regard to the claims of white settlers who have been invited by law to seek homes in the same localities; to treat the Indians as wards of the Govern-

ment, which must be the guardian and trustee of all their rights, or establish such trusteeship for them. Mr. Wetmore's plan seems to have been to reproduce, as far as circumstances will permit, the old mission system, and to revive the slumbering influences which once controlled these Indians (p. 10). The prelate of the Roman Catholic Church who was consulted by Mr. Wetmore (p. 13) suggested that that Church could have nothing to do with them unless it had permanent control "and the Indians should have permanent homes, so that our work among them may not be lost. Let the Government buy a tract of land suitable for them, at least for those who have no homes."

On page 17 the following statement is made.

> Ex-Governor John G. Downey, under date of October 10, 1874, writes a personal letter from Los Angeles, in which he says: "I am glad you have been appointed commissioner to these poor, unfortunate, deserving, and neglected Indians. * * * The Government has stood by and sanctioned the robbing of the mission lands that were intended by the Spanish and Mexican Governments for neophytes. They have lavished millions on less deserving human beings than these docile creatures. Now, in the name of humanity urge something in their behalf."

The *report of Special Agents Helen Jackson and Abbot Kinney* to the Commissioner of Indian Affairs, Washington, 1883 (Senate Doc. No. 49, 48th Cong., 1st sess.) ["Helen Jackson" was the author and humanitarian Helen Hunt Jackson] refers to the wise and humane intention of the Mexican Government toward these Indians, and to the Spanish colonization plan under the missions. In 1830, under the control of the

Franciscan Fathers, 20,000 or 30,000 of these Indians were living comfortable and industrious lives (p. 7).

> No one can visit their settlements, such as Agua Caliente, * * * without having a sentiment of respect and profound sympathy for men who, friendless, poor, without protection from the law, have still continued to work, building, fencing, irrigating on lands from which long experience has taught them that the white man can drive them off any day he chose.
>
> (P. 8.) Third. In regard to this latter class—that is, those whose villages are now within the boundaries of confirmed grants—the Government has to choose between two courses of action: Either to remove them and make other provision for them, or to uphold and defend their right to remain where they are. In support of the latter course, we believe a strong case could be made out, and we have secured from one of the ablest firms in southern California a written legal opinion on this point. It seems clear that this contest should be made by the Government itself.

See legal opinion referred to, Exhibit A, pages 14–16, of this report; see also Exhibit D, "The Warner's Ranch Indians," pages 20–22.

The report recommends that Indian reservations already set off by Executive order, and all new reservations, whether of Government lands occupied by them, or lands which may afterwards be legally reclaimed for them from the grant lands where they are now living, be patented to the several bands now occupying them, the United States to hold the patent in trust for a certain period and then to convey by patent to the Indians individually. The report calls attention to the insecurity of reservations made merely by Executive order, as illustrated in southern California by the

history of Agua Caliente among others. Upon this point it is pertinent to call attention here to the "Report on Indians taxed, etc.," under the Eleventh Census (p. 212), referring to "Agua Caliente village," in which the statement is made that "it was formerly set apart as a reservation, but the Executive order was canceled immediately after the patent had been granted to San José del Valle ranch, the second of the two grants, although whether the boundaries of the village were included within the grant is doubtful. The first three surveys of the ranch do not take the village in."

The Jackson and Kinney report goes on to state that the insecurity of the reservations set apart by Congress is only a degree less. The communal system, on which those now living in villages use their lands satisfies them. It is precisely the same system as that on which the pueblo lands were cultivated by the early Spanish settlers in southern California. The Indians respect each other's right of occupancy, etc.

Note especially in the *Indian report under the census of 1890, p. 202*, Indians in California, 1846–1890. This refers to the Mexican Government as not recognizing the Indian right of occupancy. But we contend that the statement should be held to contemplate the general Indian situation or the situation of the fighting Indians of northern California; that is, of the Indians who were afterwards gathered on reservations. (See *infra* in the passage cited.) While the right of Indian occupancy was recognized by this country even where savage tribes were concerned, this does not seem to have been the case in Mexico (cf. *Byrne* v. *Alas*, 74 Cal., 628, 634); but Indian rights, like those of the Mission Indians, where reserved or implied in grants of mission lands, can not be considered as embraced within the

above statement, for the Mission Indians' rights were specially and peculiarly recognized and protected under Spain and Mexico (see main brief, and first portion of this brief). (Note also map of location and establishment of missions interleaved between pp. 202 and 203. Page 203, Indians in California, 1846–1890; p. 207, Mission Indians; p. 212, The Mission Indians.)

This passage speaks of the Indian war of 1851 as a *slight attempt* at insurrection. The Indians seem to have been goaded to resistance by white encroachment, or have been misled by turbulent or designing men. The record shows that the Indians who attacked Warner's ranch were the Coahuilla tribe of the mountains rather than the Agua Caliente Indians (Warner's testimony, No. 209, pp. 45–47); and it is to be observed that Ex. Doc. No. 122, Fifty-first Congress, first session, which considers exhaustively the California State Indian war claims and refers to the disturbances of 1851, makes no special mention of the outbreak on Warner's ranch. There was a a general uprising of California Indians in that year, and the one attributable to these Indians evidently could not have been very serious.

See also Id., page 214. "Condition" [in 1890].

DEFINITION OF "MISSION INDIANS."

Indian Report of the Eleventh Census, page 201: "Mission Indians is the name of those Indians in California who lived under the charge of the Franciscan fathers at or near missions from and after 1769. * * * The term includes not only those who were under the care of the mission fathers, but is the name used to this day to designate the descendants of such Indians. The United States authorities, however, use it for or

apply it to such Indians descended as above and living in the three southernmost counties of the State of California."

From the foregoing reports and other authorities it seems that the relation of the Indians to the missions was partly ecclesiastical and partly feudal; that is to say, it contained elements like the feudal retainers' status under that system—there was protection on one side and service on the other. The relation was also patriarchal and communal. In this aspect the Indians looked to the mission fathers for guidance in their temporal interests, and received instruction in the primitive arts of life, agriculture, etc., while on the ecclesiastical side they were taught and civilized and Christianized. There seems to be no doubt that the relation was altogether a beneficial and creditable one.

THE TREATY OF GUADALUPE HIDALGO.

As to the tenth article of the treaty of Guadalupe Hidalgo, which was stricken out before ratification, it provided that "all grants of land made by the Mexican Government or by the competent authorities in territories previously appertaining to Mexico and remaining for the future within the limits of the United States shall be respected as valid to the same extent that the same grants would be valid if the said territories had remained within the limits of Mexico." (Ex. Doc. No. 50, H. R., 30th Cong., 2d sess., p. 17.) The protocol of the said treaty (id., p. 77) provides in its second article as follows:

> The American Government, by suppressing the tenth article of the treaty of Guadalupe, did not in any way intend to annul the grants of lands made by Mexico in the ceded territories. These grants, notwithstanding the suppression

of the article of the treaty, preserve the legal value which they may possess; and the grantees may cause their legitimate titles to be acknowledged before the American tribunals.

President Polk, in transmitting the treaty and accompanying documents to the House (id., pp. 7, 8), calls attention to the meaning of the protocol as plain; namely, that notwithstanding Article X had been expunged from the treaty, such Mexican grants were to "preserve the legal value which they may possess."

> The objection to the tenth article of the original treaty *was not that it protected legitimate titles which our laws would have equally protected without it*, but that it most unjustly attempted to resuscitate grants which had become a mere nullity. * * * The refusal to revive grants which had become extinct was not to invalidate those which were in full force and vigor.

THE CALIFORNIA ACT OF 1850.

The California act referred to in this brief is as follows (Stat. of California, 1850, p. 408):

> AN ACT for the government and protection of Indians, passed by the California State legistature, April 22, 1850.
>
> SECTION 1. Justices of the peace shall have jurisdiction in all cases of complaints by, for, or against Indians in their respective townships in this State.
>
> SEC. 2. Persons and proprietors of lands on which Indians are residing shall permit such Indians peaceably to reside on such lands unmolested in the pursuit of their usual avocations for the maintenance of themselves and their families; provided the white person or proprietor in possession of such lands may apply to a justice of the peace in the township where the Indians reside to set off to such

Indians a certain amount of land, and on such application the justice shall set off a sufficient amount of land for the necessary wants of such Indians, including the site of their village or residence, if they so prefer it, and in no case shall such selection be made to the prejudice of such Indians; nor shall they be forced to abandon their homes or villages where they have resided for a number of years; and either party feeling themselves aggrieved can appeal to the county court from the decision of the justice, and then, when divided, a record shall be made of the lands so set off in the court so dividing them; and the Indians shall be permitted to remain thereon until otherwise provided for.

THESE INDIANS ARE PEACEABLE, INDUSTRIOUS, AND HONEST.

[Extract from Annual Report of the Commissioner of Indian Affairs, for the year 1857, p. 403.]

There are at present in the counties of San Bernardino and San Diego a large number of Indians, known as "Mission Indians," who are conversant with all the operations of agriculture, and to some extent with the mechanical arts, as taught them by the native Californians, who solicit and represent that, if supplied with a few of the ordinary agricultural implements and a few oxen and mules, they would be fully able to subsist themselves, by means of agriculture, in a comfortable manner without further calls upon Government for aid. They exhibit a good degree of intelligence, and appear capable of success, if thus aided, for which they earnestly solicit.

[It seems that the dominant Indians of this section who were never brought under the Spanish governmental or religious dominion are the Coahuilas, living in the mountainous regions; the allied tribes who were Christianized and civilized are the Luisenos, represent-

ing that portion of the tribe which was originally attached to the Mission of San Luis Rey, and the Dieguenos, who were so attached to the Mission of San Diego. (Report on Indians under census of 1890, p. 201; report of Special Agents Helen Jackson and Abbot Kinney, *supra*, first page, and pp. 4, 18.)]

[Annual Report, Indian Office, 1875, pp. 9 to 11.]

THE MISSION INDIANS OF SOUTHERN CALIFORNIA.

These Indians have heretofore been the subject of much inquiry and effort for relief by the Department. In 1873 Special Commissioner Rev. John G. Ames made thorough inquiry into their condition and necessities, and made full report of the same. The measures suggested in that report and recommended by Congress for adoption not meeting with approval, Commissioner C. A. Wetmore, of California, made further inquiries as to the feasibility of a different plan for relieving their disabilities, and submitted his report in December, 1874. These reports furnished valuable information to the office, from which, together with previous reports of superintendents and agents, the following facts respecting these Indians are compiled.

They have received the name of Mission Indians from their relation to the early Catholic missions on the Pacific coast, the first of which was established at San Diego in 1769, others following until 1804, at which time there were nine missions at different points lying along the coast between San Diego and San Francisco. The missionaries, having a semireligious and semipolitical recognition by the authority of Spain and Mexico, assumed control of the entire coast, and by degrees brought the Indians under subjection and gathered them in settlements around their missions, where they

were instructed in agriculture and a low form of civilized life, and put to labor in cultivating large tracts of fertile lands, which they were allowed to occupy in common, under the direction and control of the padres The original idea on which these missions were maintained seems to have been that so soon as these Indians should be brought, as converts of the church, into a condition for self-support, the lands which they were occupying and cultivating should be allotted as their own. But the profitableness of the peonage and the docility of the Indians made any haste in the direction of individual rights unnecessary, if not undesirable, on the part of the missionaries. They were therefore continued in peonage and without recognition of their individual rights up to the date of the secularization act of 1833. At this time the Indian missions were the centers of industry and of wealth and of social attraction for the Pacific-coast country. In 1826 they were reported at twenty-one missions as numbering 25,000 and possessed of 365,000 head of cattle, sheep, and horses, and harvesting 75,000 bushels of grain. The "law of secularization," passed in the Mexican Congress, treated all these Mexican lands, with their improvements, flocks, and herds, as the property of the church, and divided them up among a few Spanish and Mexican families. The Indians were scattered over the country, principally along the coast, upon the fertile, watered, and then unoccupied tracts, and procured their living by herding wild cattle and horses, cultivating small patches of ground, and receiving employment from the surrounding whites, whom they accepted virtually as their masters.

In this way they gradually came into possession, and some have continued to occupy the best portions of

the country without inquiry as to whether their homes were embraced in the boundary lines of a Mexican grant or liable at any moment to be entered at the land office in the name of some settler.

When the tide of trade and the gold emigration swept over the State of California, these Indians were found practically without protection by law in their rights to the land on which they were living, and by suits of ejectment and cost of contingent fees it was comparatively easy for the incoming American to dispossess all the Indians of northern and middle California Thus made homeless wanderers, the process of vice and destitution by which they were carried away is fitly described as extermination. For the 4,000 or 5,000 who remained in the southern portion of Lower California, this doom seems to have been postponed by the delay in the settlement of the country. Gradually, however, for the past eight years, southern California has been filling up by immigration; Spanish and Mexican grants have been "determined" in such a way as to cover choice tracts wherever found; large ranches have been cut up and the desirable portions of public domain preempted; and thus all available agricultural lands have been seized or occupied by individual owners, who, in conformity to law, have become possessed of the lands on which the remnants of a few thousand Mission Indians are making their homes in San Diego and San Bernardino counties. So long as the preemptors and purchasers did not require their lands for use or sale, the Indians were allowed to remain undisturbed and in blissful ignorance of the fact that the place they called home had by law passed to the ownership of another. Of late, under the increasing demands for these lands,

writs of ejectment are being procured by which the Indians are forcibly dispossessed and turned adrift in poverty and wretchedness.

The Indians living on the tract of land known as Temecula, in the county of San Diego, have within the past two months been thus dispossessed. The Temecula ranch was confirmed by the district court of the United States for the Southern district of California to Louis Vigues in 1855. No steps were taken to disturb the Indians until 1873, when a judgment was recovered in the city of San Francisco against these Indians, who were at that time living 500 miles away, all unconscious that any person was seeking their possessions; and on the 17th of August last the owners, under Vigues, procured a writ from the court in San Francisco for ejectment of Indians, and for the satisfaction of the costs by the personal property of the Indians. The execution of this writ has not only deprived the Indians of their homes and of their crops just maturing for harvest, but has taken their little personal property in satisfaction of cost of judgment. It is easy to understand the exasperation and despair produced among the Indians by such an order enforced by the authority of the State. Their remonstrance and threats under the provocation were interpreted to mean violence, and the aid of the United States military was evoked against them. Their forbearance and peaceful disposition were, however, soon manifest, and the fears of white citizens allayed. The agent has been instructed to procure, if possible, a suitable ranch which may be leased temporarily, with privilege of purchase; but the embarrassments under which the Department has labored for the past two years in its efforts to rescue these Indians from their present condition still continue. There are no ade-

quate funds for their relief, either in purchasing small tracts of country, or leasing ranches, or for furnishing rations in adequate amount.

[The report of Special Commissioner Rev. John G. Ames, *supra*, will be found in H. R. Ex. Doc. No. 91, 43d Cong., 1st sess.]

[Annual Report of the Commissioner of Indian Affairs for the year 1874.]

[Pages 72 and 73.]

CALIFORNIA.

Mission Indians.—The plan earnestly recommended by the Department to Congress at its last session for ameliorating the condition of the 5,000 Mission Indians in Southern California did not meet the approval of that body, and nothing has been attempted in their behalf beyond the appointment of a commissioner, who has visited them during the past few months and is endeavoring to procure a title to certain lands, either in a body or in small patches, which these poor and inoffensive people may hold for a homestead while they make their living by herding goats and sheep and laboring for the surrounding settlers. These Indians, like those mentioned in Arizona, came to us in the acquisition of Mexican territory, and like them have been stripped of all rights, even to the lands from which they and their fathers had for hundreds of years derived a comfortable living. This class of Indians seems forcibly to illustrate the truth that no man has a place or a fair chance to exist under the Government of the United States who has not a part in it.

[From Annual Report, Indian Office, 1879, page xli.]

MISSION INDIANS.

The necessity for early legislation to provide a suitable and permanent home for the Mission Indians of

California is urgent. They are estimated to number about 3,000, and are scattered in small bands over San Diego, San Bernardino, and Los Angeles counties, earning a precarious livelihood by cultivating small patches of land and working for ranchmen and white settlers when opportunity offers. Many of them are now occupying by sufferance lands which their ancestors have cultivated from time immemorial, and to which they supposed they had an indisputable right; but those lands have lately been found to be within the limits of private land claims confirmed by the courts to grantees under the Mexican Government before the acquisition of California by the United States.

In many cases the owners or occupants of these ranches have availed themselves of the labor of the Indians in cultivating the land (often at most unjust and oppressively low rates, however), and the Indians have also been permitted to occupy and cultivate small tracts for themselves; but now, desiring to dispose of the ranches, or to use the whole for their own purposes, the owners have threatened the Indians with summary ejectment. This, together with the conflicts arising from trespass upon the lands of the ranchmen and settlers, by stock belonging to the Indians, has kept these poor people in doubt and anxiety for two years past, until at the present day they are in a state of the most abject poverty to be found anywhere on the American continent.

[From Annual Report, Indian Office, 1879, pages 13 and 14.]

[From annual report of Indian Agent S. S. Lawson.]

MISSION AGENCY, SAN BERNARDINO, CAL.,
August 28, 1879.

SIR: I have the honor to submit the following as my first annual report of the condition of things at this agency:

The Indians under my charge, known as the *Mission Indians*, are composed of the following-named tribes, viz: Seranos, Digenes, San Luis Rey, and Coahuillas and Owongos. Their settlements are scattered over portions of San Bernardino and San Diego counties, and chiefly in the mountain and desert districts embraced in a range hundreds of miles in extent. Here and there lands have been reserved for them, but their character is such that very little of it is of any practical use, and very few, comparatively, are living on the lands so reserved.

For generations past many have had their villages on what they supposed to be "the public domain," and which they believed would ultimately be set apart for them, but which in almost every instance turned out to be covered by the ubiquitous "Spanish grant," whose title has been confirmed to the inevitable "land grabber." In some instances, however, they have been accorded the favor of remaining on and cultivating these lands so long occupied by them, but not without frequent difficulties growing out of conflicting interests. The agent is continually harassed by complaints from one or both parties as to injuries or wrongs endured.

Under this unsatisfactory state of things, which has long existed, frequent efforts have been made to influence Government to provide a suitable reservation upon which to consolidate these scattered Indians. A joint resolution of the last general assembly of California was transmitted by its governor to Congress asking that this be done; and, prior to the assembling of the last Congress, letters setting forth the condition of affairs at this agency were forwarded to the Department by myself, with a view of securing at that session such action as it seemed to me the exigencies of the case demanded. But beyond the bringing the subject

before the House Committee of Indian Affairs nothing was effected. It is hoped that another session will not be permitted to pass by without final and definite action being taken looking to the purchase of suitable lands for a reservation and the consolidation of these Indians upon it before another year is past. If assurance of this kind does not come to the owners of the lands now occupied by most of them, their ejectment is certain to follow.

The Mission Indians are all engaged in agricultural pursuits, either in the cultivation of the little fields they *call* their own, or in laboring for ranchmen in the vicinity of their villages. But, on account of the sparseness of white settlers in these mountain and desert districts, and the consequent scarcity of labor, they are forced often to go from fifty to one hundred miles to procure work. At some seasons of the year it is impossible for all to find employment, while at others, such as in the sheep-shearing season, they find ample and remunerative employment, and are eagerly sought for by the large ranchmen. They excel all others in this kind of labor. With few exceptions, the Mission Indians are industrious, having always maintained themselves by their own labor. They do not now and never have asked for supplies of any kind from Government. All they ask is that land be given them upon which they may have an opportunity to better support themselves and families.

[From Annual Report, Indian Office, 1880, pages 12 and 13.]

[From annual report of Indian Agent S. S. Lawson.]

In January last the copy of an Executive order was sent me rescinding a prior order setting apart certain lands long occupied by a considerable body of Indians, known as the Agua Caliente Indians of the Coahuilla

tribe, on the ground that said lands were embraced within the boundaries of the rancho "San Jose del Valley." In conversation a few days ago with ex-Governor Downey, the present owner of the ranch, he informed me that he was about to sell it, and before he could give possession the Indians must be removed. What these people will do in this event, or where they can be placed so as to find subsistence in this sterile region of country, are questions that I am not able to answer. This is the situation of an equally large body of Indians now occupying the rancho San Jacinto, their ejectment being liable to occur at any time. This, in short, is the situation all round; and, there being no unoccupied public lands, except such as are uninhabitable, the only alternative left to these hitherto peaceable and thrifty communities is to wander about singly or by families to swell the vagabond class that already infests the villages and towns to become a prey to vices to which as yet they are comparative strangers.

As a class, the Mission Indians are industrious. During the season when labor can be had very few are found idle, and I am glad to be able to report that at present the demand for Indian laborers is more than equal to the supply, the result being plenty to eat and wear, with contentment. But, owing to their improvidence, a large proportion of them, notably those who are dependent on wages for labor, will be destitute of subsistence when the winter season comes on. Supplies of flour, meat, beans, and bacon were purchased last fall, and issued to them during the winter months when little or no labor could be found. The low rates at which I purchased these supplies made the amount expended go far toward relieving all who needed help. The same destitution will prevail again when the labor-

ing season is over, and the question of relief be forced upon the attention of the Department.

Those who by sufferance have lands to cultivate where they live have tilled them to profit during the season. Only yesterday two Indians from the San Luis Rey tribe called at the agency, reporting that they had come with two wagons, loaded with over 7,000 pounds of wheat, which they were having ground into flour for sale and for their own use. This amount the two men had raised by their own labor, and they report that their people have plenty of wheat and are doing well.

It is doubtful, however, whether they will be allowed to gather another harvest from those fields which they have long cultivated, and which, until recently, they believed to be reserved lands. Two years ago a "land-grabber" suddenly discovered that these Indians were not on the lands reserved for them in a given township east of the meridian line, but in the corresponding township west of the meridian, and at once "filed upon the land they occupied under the desert-land act." How lands cultivated by these people for more than a generation can be called "desert" I am not able to answer. But it is quite likely that certain land officials in these parts who consider the occupancy of lands by Indians as of no more significance than their occupancy by so many coyotes will have less difficulty with such questions. The Indian "must go" if he is on a patch of ground that a white man wants, and no matter that he has lived on and cultivated it for a generation. It is wanted all the more on account of its improved condition. A proper regard for justice, it seems, should prompt to some measure by which these parcels of lands might be withheld from sale and settlement until

it was seen whether it would not be in the interest of economy, as well as of justice and humanity, to give the Indian occupant permanent possession of what he has come to regard as his home.

[From Annual Report, Indian Office, 1884, pages 13 and 14.]

[From annual report of J. G. McCallum, Indian agent.]

THEIR CHARACTER.

They are peaceable and honest with but few exceptions. The young are generally ambitious and quick to learn, but not ambitious to provide for the future. They are much superior in appearance and intelligence to the other California tribes. They have little self-reliance, very subdued in manner, like people who had been accustomed to bondage or other great wrongs, and the younger portion are very timid. These Indians show no disposition to resist the policy of the Government, which they are always anxious to know, and although sometimes not acting upon what is given as advice, yet always respecting the orders of the Government.

RESERVATIONS.

These Indians have about twenty reservations, which include most of their villages, but several of these villages are within the boundaries of Mexican grants, for which patents have been issued by our Government which contain no exceptions in favor of the Indians living upon them, but all, or nearly all, such grants contained provisos in favor of such Indians.

One of the grant-holders about six months since commenced an ejectment case against about 100 Indians who reside in their village, called San Jacinto. The

special counsel employed by the Government to defend the rights of the Indians in such land cases have engaged in the defense, but the case has not been pressed on either side. In the meantime the Indian defendants remain in peaceable possession, and the plaintiff by filing his complaint has prevented the bar of the statute of limitations. Similar complaints will likely be filed against the other Indians living in villages on such grants during this year to prevent the bar of that statute.

Our learned opponents cite several passages from Mr. Hubert Howe Bancroft's "History of the Pacific States," making, however, some inadvertent errors: for instance, the citation in the second line of page 16 of their main brief to "volume 20, page 624," can not be verified. However, on our own part we respectfully call the court's attention to Mr. Bancroft's work, especially to chapter 20 of volume 18, entitled "Mexican land titles," from which the doubtful nature of many Mexican grants and the competing interests and questionable motives which were rife in California during the period of those grants, and after the acquisition of sovereignty by the United States, clearly appear, along with a statement of certain specimen cases and references to mission lands, friars, neophytes, and the church. This chapter presents an instructive history of the Mexican system of colonization and land grants, of legislation by the United States, and of the work of the land commission under the act of 1851.

In volume 19 of the same work the court's attention is directed to chapter 18, entitled "Extermination of

the Indians." The unfounded assertion of Indian revolt and atrocities is plainly shown, e. g. (pp. 476, 477):

> Their hatred for Indians was acquired on the plains, from which the milder tribes of California had to suffer. * * * Thus it is that the California Valley can not grace her annals with a single Indian war bordering on respectability. It can boast, however, a hundred or two of as brutal butcherings on the part of our honest miners and brave pioneers as any area of equal extent in our Republic. The poor natives of California had neither the strength nor the intelligence to unite in any formidable numbers. Hence, when now and then one of them plucked up courage to defend his wife and little ones or retaliate on one of the many outrages that were constantly being perpetrated upon them by white persons, a sufficient excuse was offered for the miners and settlers to band and shoot down any Indians they met, etc.

Page 479 speaks of the "slaughter" of 30 Indians suspected of murder, and the "indiscriminate massacre" of a band; and see note 11, same page; see also note 24, page 492, and especially the concluding portion of said note on page 494.

[End of Appendix.]